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Workers' Compensation: Problems in the Revision, Recommendation for the Future

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RECENT DEVELOPMENT

WORKERS' COMPENSATION: PROBLEMS IN THE REVISION, RECOMMENDATION FOR THE FUTURE

I. INTRODUCTION

After truck driver Marvin Fox choked on a piece of sausage in a restaurant one morning, the workers' compensation he was awarded for his injury caused an uproar about the Oklahoma workers' compensation system.¹ In addition, when the National Council on Compensation Insurance submitted a rate increase of 41.9 percent to the State Board for Property and Casualty Rates in the summer of 1985,² it may not have realized that its request would be an impetus for change in Oklahoma. With the perception that recovery under the system was too liberal and the reality of insurance rate increases, the Oklahoma legislature entered its 1986 session with workers' compensation reform as a top priority.³

Oklahoma's much-heralded workers' compensation reform may correct some abuses; however, those corrections need embellishment. Workers' compensation in Oklahoma is a system which has strayed from its original purpose. Presumptions about periods of disability for certain injuries are the rule, regardless of whether such presumptions are actually related to a worker's loss of wages or earning capacity.⁴

True reform is best served by returning the system to its original purpose of compensating for loss of wages which result from work-related injuries. Florida recently enacted this type of a wage-loss work-

1. Fox v. National Carrier, 709 P.2d 1050 (Okla. 1985). After choking on the sausage, Fox began vomiting so violently that he ruptured a cervical disk and required surgery. *Id.* at 1052. The Oklahoma Supreme Court reversed the decision of the trial court and awarded compensation, reasoning that "since eating is necessarily incidental to the work of a traveling employee, injuries arising thereof are compensable." *Id.* at 1053.

2. Hamilton, *Workers' Compensation Rate Filing Produces Flurry of Reform Activity*, 46 OKLA. LEGIS. REP., Jan. 3, 1986, Rep. No. 2 at 5.

3. 46 OKLA. LEGIS. REP., Jan. 1, 1986, Rep. No. 1 at 5. House Speaker Jim Barker stated that "a majority of House members feel that the major issue of the legislative session is workers' compensation." *Id.*

4. See, e.g., the schedule at OKLA. STAT. tit. 85, § 22 (1981).

ers' compensation statute.⁵ Oklahoma would be wise to examine this statute. In terms of both judicial and economic resources, a wage-loss system is more fair and more efficient than the status quo.

II. THEORY OF WORKERS' COMPENSATION LAWS

A. Policy

To fall under the coverage of a workers' compensation statute, an employee must suffer a "personal injury by accident arising out of and in the course of employment" or an occupational disease.⁶ Both economic and social policies are furthered by workers' compensation statutes. The cost of work-related injuries is internalized by the industry rather than falling on the unfortunate worker and his family. Industry then passes the cost on to the consumers of goods and services. In many cases, society bears the expense of the employee's injury in some form anyway.

Workers' compensation is the result of a legislative and social compromise based on the bargain principle that both the employer and employee give up something in exchange for something else. The employer gives up his immunity from liability to the employee without a showing of fault. In exchange, the employee gives up his common law right to tort damages for an employer's negligence. The employer is freed from potentially large damage awards, and the worker receives a guarantee of compensation for employment-related injuries which impair his earning capacity.⁷

5. FLA. STAT. ANN. § 440 (West 1981 & Supp. 1986). The new Florida workers' compensation statute was enacted in 1979.

6. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.10, at 1 (1985). These words from the British Compensation Act have been adopted in nearly every American jurisdiction. H.B. BRADBURY, WORKMEN'S COMPENSATION LAW 14-15 (3d ed. 1917). OKLA. STAT. tit. 85, § 2.1 (Supp. 1987), states that "compensation provided for in the Workers' Compensation Act shall be payable to an employee for injuries arising out of and in the course of his employment."

Larson, a noted workers' compensation authority, has described the workers' compensation system as "a [no-fault] mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product." 1 LARSON § 1.00 at 1.

7. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.11 at 12-1 to 12-6 (1986). See *Weber v. Armco, Inc.*, 663 P.2d 1221 (Okla. 1983), wherein the court states:

Workers' compensation is a mutual compromise in which the employee relinquishes his/her right to sue for damages sustained in job-related injuries; and the employer accepts no-fault liability for a statutorily prescribed measure of damages. This trade-off has the net effect of imposing a form of strict liability upon the employer to pay for industrial accidents. As a result, workers' compensation is the exclusive damage remedy for the injured employee; and the employer is given immunity from common-law tort liability.

Id. at 1224 (footnotes omitted).

If the worker's injury falls under the coverage of the workers' compensation act,⁸ the act provides the employee's exclusive remedy for the injury.⁹ Thus, even if the injury is covered by the act but is an injury for which recovery is not allowed, the employee may not pursue a common-law remedy against his employer.¹⁰ Injuries for which the act provides no remedy may include disfigurement,¹¹ damage to sexual and child-bearing organs,¹² loss of sensory perceptions such as taste and smell,¹³ and pain and suffering which does not impair earning capacity.¹⁴ Common law rights of spouses or parents to sue for loss of consortium or services are also barred.¹⁵

Workers' compensation is neither a strict liability tort remedy nor a system of social insurance, although it includes characteristics of both. Arthur Larson, a leading authority on workers' compensation, believes that "[a]lmost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of tort ideas, or . . . to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy."¹⁶

8. An injury is covered by the act when it meets the requirement of a personal injury by an accident arising out of and in the course of employment or an occupational disease.

9. 2A LARSON, *supra* note 7, §§ 65, 65.11, at 12-1 to 12-6 (1986).

10. *Id.* § 65.00.

11. *E.g.*, *Morgan v. Ray L. Smith & Son, Inc.*, 79 F. Supp. 971 (D. Kan. 1948) (third degree burns causing disfigurement not compensable although covered under exclusive remedy of workers' compensation act); *Nowell v. Stone Mtn. Scenic R.R.*, 150 Ga. App. 325, 257 S.E.2d 344 (1979) (burns on neck and chest disfiguring the employee but not resulting in disability not compensable); *Adams v. Iten Biscuit Co.*, 63 Okla. 52, 60-61, 162 P. 938, 945-46 (1917) (although burns on employee's hands and arms resulting in loss of use constituted total disability under the act, plaintiff was not allowed to pursue a common law remedy for disfigurement of head, face, and other bodily parts because of exclusivity of compensation act).

12. *E.g.*, *Heidler v. Industrial Comm'n*, 14 Ariz. App. 280, 482 P.2d 889 (1971) (sexual impotency not compensable because no loss of earning capacity); *Puffer Mercantile Co. v. Arellano*, 190 Colo. 138, 546 P.2d 481 (1975) (loss of testicle not compensable).

13. *E.g.*, *Matthews v. Industrial Comm'n*, 627 P.2d 1123 (Colo. Ct. App. 1980) (loss of sense of taste and smell produced no impairment of earning capacity). *Cf.* *Scott v. C.E. Powell Coal Co.*, 402 Pa. 73, 166 A.2d 31 (1960) (permanent loss of sense of taste and smell is permanent partial disability under the act, but no compensation was awarded in this case because plaintiff's earning power was not diminished).

14. *E.g.*, *Blancett v. Homestake-Sapin Partners*, 73 N.M. 47, 385 P.2d 568 (1963) (pain and discomfort of knee injury not interfering with wage-earning ability not compensable); *Fisher v. Consol. Freightways, Inc.*, 12 Or. App. 417, 507 P.2d 53 (1973) (back pain not causing disability not compensable).

15. *E.g.*, *Williams v. State Comp. Ins. Fund*, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975) (wife not allowed consortium recovery for injury to husband's genitals, groin, and thighs); *Rios v. Nicor Drilling Co.*, 665 P.2d 1183 (Okla. 1983) (widow not entitled to pursue loss of consortium claim, which is barred by the exclusive remedy provision.).

16. 1 LARSON, *supra* note 6, § 1.20, at 2-3. Worker's compensation differs from strict liability in tort in that its test of liability is work connection rather than fault. Strict liability in tort is still a

A comprehensive study of state workers' compensation laws was undertaken in the early 1970's by the National Commission on State Workmen's Compensation Laws.¹⁷ This presidentially-appointed commission was created by the Occupational Safety and Health Act of 1970¹⁸ to study state workers' compensation laws. In 1972, the Commission submitted a report in which it urged the achievement of five basic objectives:

- 1) Broad coverage of employees' work-related injuries and disease;
- 2) Substantial protection against interruption of income;
- 3) Provision of sufficient medical care and rehabilitation services;
- 4) Encouragement of safety; and,
- 5) An effective system for delivery of the benefits and services.¹⁹

The Commission also made several essential recommendations.²⁰ The decade after the Commission's report "was marked by the most dramatic liberalization of state compensation statutes in history"²¹ because of an implied threat of alternate federal legislation if the Commission's essential recommendations were not enacted by July 1, 1975.²² As a result, more employees were included under coverage of the statutes than ever before, and occupational disease coverage and unlimited medical

fault-based concept in that it continues to recognize defenses of act of God, act of a third person, and consent of the plaintiff. *Id.* § 2.30, at 9. Employment-connected injuries in a pure workers' compensation system have none of these defenses. Under a workers' compensation system, only injuries affecting earning power are compensated. *Id.* § 2.40, at 10. See *supra* notes 11-14 and accompanying text for examples of injuries not affecting earning power. Compensation is not to make a claimant whole, as with tort recovery, but adds an amount to any remaining earning capacity to allow him to survive without being a burden to society. *Id.* § 2.50, at 11. The injured employee does not own the workers' compensation award. Therefore, the award cannot be devised, assigned, attached, or garnished. *Id.* § 2.60, at 12-13.

Workers' compensation is also distinguishable from public social insurance. Workers' compensation is largely private in character, with the cost of compensation borne not by the public at large, but by consumers of the particular goods or services produced by the employer. *Id.* § 3.10, at 15; § 3.20, at 17. Recovery under a workers' compensation system varies in each case because recovery is based on lost earning capacity and the amount of an employee's previous wages. *Id.* § 3.30, at 19-20. A claimant's status as an employee may be determined in retrospect, subjecting an employer to retroactive unilateral liability. *Id.* § 3.40, at 20.

17. F. ELKOURI, *WORKERS' COMPENSATION IN OKLAHOMA* 28 (1978). See Note, *Workmen's Compensation: National Commission on State Workmen's Compensation Laws: Import for Oklahoma*, 26 OKLA. L. REV. 446 (1973).

18. 29 U.S.C. §§ 651-78 (1982).

19. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, *THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS* 35 (1972) [hereinafter *COMMISSION REPORT*].

20. *Id.* at 126-27. The essential recommendations include: making the system compulsory; not exempting employers based upon the number of employees; extending coverage to include farm and domestic workers; and extending full coverage to employees suffering from work-related diseases.

21. A. LARSON, *WORKERS' COMPENSATION LAW* § 5.30, at 29 (Cases and Materials Series 1984).

22. *COMMISSION REPORT*, *supra* note 19, at 26.

benefits were extended in all states.²³

B. *Modern Disagreement over the Theory of "Disability"*

The primary conflict in workers' compensation today is between a wage loss or earning impairment theory of disability and a physical incapacity theory of disability.²⁴ A pure wage loss statute would stand at the end of the earning impairment side of the spectrum. This type of statute would simply compare an employee's earnings prior and subsequent to injury and award appropriate compensation. No pure wage loss statute is in force in any American state.²⁵ At the other end of the spectrum would be a pure physical impairment statute in which lump sum cash payments would be made for specific injuries without regard to any actual wage loss of the employee or impairment of his earning capacity.

The physical impairment theory of disability makes extensive use of the schedule principle.²⁶ A schedule is a "list describing various members of the body, and prescribing a fixed number of weeks of compensation for their loss or loss of use."²⁷ The schedule loss amount is paid to the employee without regard to any actual loss of income suffered. Schedules were originally used because the severity of a worker's impairment supported the presumption that there had been or would be an actual wage loss. Consequently, there would be no controversy in awarding the amounts of compensation due to the conspicuous loss. The legislators thought that a schedule would prevent litigation because the amount for the loss would be definite and certain.²⁸

Originally, the schedule covered only loss of major members of the body. It was thought that the effect of less serious injuries or losses on

23. *Id.*

24. Disability has been defined by Arthur Larson as "inability, as the result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training." 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 57.00 (1986).

25. *Id.* at 10-49.

26. *Id.* § 57.14(c), at 10-53.

27. *Id.* § 57.14(d), at 10-58. See OKLA. STAT. tit. 85, § 22 (1981 & Supp. 1987). For example, under the category of permanent partial disability, the schedule lists compensation of 66 2/3 percent of an employee's average weekly wages to be paid to an employee for thirty-five weeks for the loss of a first finger, for ten weeks for the loss of a toe other than the great toe, and for fourteen weeks for a hernia. *Id.*

28. Larson quotes from Professor Francis H. Bohlen of the University of Pennsylvania Law School, whom he calls "probably the most brilliant workers' compensation analyst of his time." 2 LARSON, *supra* note 24, § 57.14(c), at 10-54 to 10-55. Professor Bohlen, while addressing the Law Association of Philadelphia in 1912, stated that "by rendering the amount definite litigation would be prevented and certainty attained" by the use of a limited schedule. 2 LARSON, *supra* note 24, § 57.14(c), at 10-54 to 10-55.

earning capacity would vary substantially depending on the type of work or trade practiced by the injured employee.²⁹ Gradually, however, the schedule principle was dramatically expanded.³⁰ Not only was payment for injury to additional bodily parts and organs added to the schedules, but awards were more frequently made in a lump sum rather than in periodic payments which were to substitute for lost wages.³¹ With an extensive schedule, the original earning capacity theory of disability has generally been displaced by the physical impairment theory. Some states have in fact specifically adopted the physical impairment theory, either statutorily³² or judicially.³³

Because workers' compensation systems were not originally established to award for physical injury independent from its effect on earning capacity, the concept of compensable disability involves both medical or physical disability and actual wage loss disability.³⁴ "The proper balancing of the medical and the wage-loss factors is, then, the essence of the 'disability' problem in workmen's compensation."³⁵

29. *Id.* § 57.14(c), at 10-55. Again Larson quotes Professor Bohlen: "[T]he effect of minor injuries varies so enormously with the trade of the individual, that no average can be stuck [sic] that will give a fair general result." *Id.*

30. *Id.* § 57.14(d), at 10-58 to 10-59.

31. Lump sum awards were frequently made because states set very low maximum limits for weekly benefit rates. For example, before reform legislation was passed in Oklahoma in 1977, an employee was entitled to receive 66 2/3 percent of his average weekly wages to a maximum of a specific dollar amount set by the state. OKLA. STAT. tit. 85, § 22(5) (1971). Before the 1977 workers' compensation reform was enacted, Oklahoma's maximum weekly rate for compensation benefits was the lowest in all fifty states. Sturm, *The Workers' Compensation Act of 1977*, 3 OKLA. CITY U.L. REV. 1, 19 (1978). Because the benefit rate was too low for a worker to support himself or his family, judges frequently awarded compensation as a lump sum. *Id.* at 29. This was apparently the case in many states. See 3 A. LARSON, *THE LAW OF WORKMENS' COMPENSATION* §§ 82.70 - 82.72 (1983).

32. *E.g.*, MINN. STAT. ANN. §§ 176.021(3), 176.101 (West Supp. 1987) (economic recovery compensation and impairment compensation are separately awarded).

33. See, *e.g.*, *Cuarisma v. Urban Painters, Ltd.*, 59 Hawaii 409, 583 P.2d 321 (1978) (injured worker entitled to lump sum disfigurement benefits as well as permanent total disability benefits); *Cody v. Jayhawk Pipeline Corp.*, 222 Kan. 491, 565 P.2d 264 (1977) (primary purpose of workers' compensation is to compensate for physical injuries; subsequent increase in salary irrelevant); *Buechler v. North Dakota Workmen's Comp. Bureau*, 222 N.W.2d 858 (N.D. 1974) (two distinct elements of compensation are provided, one for loss of wages and earning capacity and one for detriment to a person's whole body).

34. 2 LARSON, *supra* note 24, § 57.11, at 10-12. Disabilities traditionally fall into four classifications: (1) temporary total; (2) temporary partial; (3) permanent total; and (4) permanent partial. *Id.* § 57.12(a). See OKLA. STAT. tit. 85, § 22 (1981 & Supp. 1987), which classifies disabilities into these four categories.

Larson states that temporary total and temporary partial disability result in little controversy because they are usually established by evidence of actual wage loss. 2 LARSON, *supra* note 24, § 57.12(b), at 10-14. The controversy occurs with permanent impairment, either total or partial. *Id.* at 10-17. It is in this context that the two competing theories of disability are most important. *Id.*

35. 2 LARSON, *supra* note 24, § 57.11, at 10-12.

Professor Larson believes that the original centrality of the earning impairment principle has eroded and should be restored in the workers' compensation area.³⁶ The historical origins of workers' compensation show that it was intended to support workers during periods of actual disability, pay medical expenses for the injured worker, and provide death benefits to a deceased worker's dependents. In practice, the system has gradually evolved into a system of cash payments for physical impairment with little regard for either actual or presumed loss of earning capacity.³⁷

In 1979, Florida drastically overhauled its workers' compensation statute to move it much closer to the actual wage loss end of the spectrum.³⁸ The goal of the legislation was two-fold: to return the system to its underlying theory of compensating injured workers for their loss of earning power and to reduce skyrocketing costs.³⁹ The means chosen to effectuate the goal were also two-fold: to introduce more objectivity into the system in order to prevent costly and inequitable litigation, and to streamline administration of the system to cut costs.⁴⁰

The main change in the statute is that a wage loss system of determining compensation was enacted with only a very limited schedule for catastrophic injuries, such as amputations.⁴¹ Once permanent partial impairment has been found to exist,⁴² the worker is entitled to wage loss benefits based on actual wage loss.⁴³ By tying benefits to actual wage loss, the standard for awarding compensation is more objective, and the possibilities for litigation are reduced.⁴⁴ The statute also succeeds in its goal of giving compensation for injury to earning capacity and not just for physical impairment.

36. *Id.* § 57.14, at 10-46; see *infra* notes 26-31 and accompanying text for reasons for the erosion.

37. *Id.* at 10-45 to 10-46.

38. FLA. STAT. ANN. § 440 (West 1981).

39. Sadowski, Herzog, Butler & Gokel, *The 1979 Florida Workers' Compensation Reform: Back to Basics*, 7 FLA. ST. U.L. REV. 641, 649-50 (1979) [hereinafter Sadowski].

40. *Id.* at 650-53.

41. FLA. STAT. ANN. § 440.15 (West 1981 & Supp. 1986).

42. Under § 440.15(3)(a)(3), the existence and degree of permanent impairment is to be determined by the American Medical Association's Guides to the Evaluation of Permanent Impairment or a schedule adopted for use under this section.

43. The employee will receive "95 percent of the difference between 85 percent of the employee's average monthly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared monthly." FLA. STAT. ANN. § 440.15(3)(b)(1) (West 1981 & Supp. 1986).

44. Sadowski, *supra* note 39, at 650.

III. WORKERS' COMPENSATION LAW IN OKLAHOMA

A. *History of Workers' Compensation in Oklahoma*

The first Oklahoma workers' compensation statute took effect in 1915.⁴⁵ This statute covered only "hazardous" employment, defined to include "manual or mechanical work or labor" specified on a statutory list.⁴⁶ Under this early system of compensation, many workers were not covered by the act because their jobs, although hazardous, were not included on the statutory list.⁴⁷ The difference in treatment between hazardous and non-hazardous occupations was arbitrary, resulting in unfair distinctions among various workers. This system promoted the policy behind workers' compensation, treating the cost of injury to an employee as a cost of production to be passed on to the consumer, in only a limited way.

Based on the statutory list, it was difficult for an employer to know whether his employees were covered by the law.⁴⁸ Although an employer had the right to voluntarily insure employees not included on the statutory list, and the employer and insurance carrier were then estopped to deny that the employee was in a hazardous employment covered by the act,⁴⁹ there were nevertheless problems for employers as well as workers under this type of system.⁵⁰

The Report of the National Commission on State Workmen's Compensation Laws⁵¹ was a watershed in workers' compensation laws in the

45. See OKLA. STAT. tit. 85, §§ 2, 3 (1951).

46. ELKOURI, *supra* note 17, at 1; Sturm, *supra* note 31, at 8. Larson says that the limitation of coverage to hazardous employment "is an inheritance from the pre-1917 period in which there were serious doubts whether a statute not so restricted would be constitutionally within the boundaries of the police power." 1C A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 55.10, at 9-262 (1986). Hazardous employment included work in factories, mills, foundries, oil refineries, and jobs such as policemen and firemen. Clerical workers in such employments were often specifically excepted from coverage. OKLA. STAT. tit. 85, § 2 (1971).

47. ELKOURI, *supra* note 17, at 1; Sturm, *supra* note 31, at 9; Note, *supra* note 17, at 450.

48. Sturm, *supra* note 32, at 9.

49. This provision was added by the laws of 1947. OKLA. STAT. tit. 85, § 65.2 (1951).

50. In his 1917 treatise on workers' compensation, Bradbury blasted the principle of coverage based on a hazardous and non-hazardous distinction as "inane and wholly indefensible." 1 BRADBURY, *supra* note 6, at 8. He gave the example of a worker protected under the act while driving the employer's vehicle who goes behind the counter to wait on the employer's customer, steps on a nail, and dies of tetanus unprotected by the statute. He concludes:

It makes absolutely no difference to a widow with several small children, who is left penniless by the sudden death of her husband, whether he was a structural iron worker or a clerk. The black despair which the widow faces in either case is the same. The effect on the children, as to whether they shall have proper nourishment and education, or shall become physically and mentally deficient and morally perverted, is the same in either case.

Id. at 9.

51. COMMISSION REPORT, *supra* note 19.

United States. One of the basic objectives of the report was "broad coverage of employees and work-related injuries and diseases,"⁵² and several of the essential recommendations which encouraged expanded coverage of employees were inconsistent with exclusions based on a hazardous and non-hazardous employment distinction as in Oklahoma's law.⁵³

Oklahoma was affected by the Report, and reform began in 1975 with the appointment of the Governor's Special Advisory Committee on Workers' Compensation by then-Governor David L. Boren.⁵⁴ In a letter to his chairman-designate, Governor Boren pointed out that the benefits of workers' compensation were not extended to many Oklahoma employees because the statutory list of covered employees in hazardous employments was "out of date" and "discriminatory."⁵⁵ Governor Boren also charged that workers' compensation benefits paid in Oklahoma were "among the very lowest in the entire nation while, at the same time, the rates for insurance premiums being paid by our employers remain among the highest of all the surrounding states."⁵⁶ Besides concern for employees who were not covered by the act and employers who had to bear high insurance premiums, there was concern about the threat of more stringent federal workers' compensation legislation in the event Oklahoma did not reform its laws appropriately.

B. *Workers' Compensation Reforms of 1977*

The Oklahoma legislature worked for two years to develop a new workers' compensation system. Legislation was finally enacted during the last week of the 1977 legislative session, to become effective July 1, 1978.⁵⁷ The gap of one year between enactment and the law's effective date occurred because the law was so controversial that legislators wanted another chance to revise it prior to its effective date. In fact, efforts were made during the 1978 legislative session to defeat two primary reforms of the law: 1) changing coverage to include workers previously not covered because they were not engaged in hazardous employment; and 2) defining disability by the "physical impairment" test instead of the previous test of "inability to perform manual labor."⁵⁸ A

52. *Id.* at 35.

53. *Id.* at 126-27.

54. ELKOURI, *supra* note 17, at 31.

55. The letter is reprinted in ELKOURI, *supra* note 17, at 31-33.

56. *Id.* at 31.

57. ELKOURI, *supra* note 17, at 37; Sturm, *supra* note 31, at 2.

58. ELKOURI, *supra* note 17, at 38.

bill defeating these changes was passed by both the House and the Senate but vetoed by Governor Boren.⁵⁹ Two attempts to override this veto failed.⁶⁰

Highlights of changes in the law included abolition of the State Industrial Court and its replacement by the Workers' Compensation Court and an Administrator of Workers' Compensation.⁶¹ The duties of the Administrator were administration of the Act, employment of personnel to carry out the duties of the position, and adoption of rules and regulations under the Oklahoma Administrative Procedures Act.⁶² Because of legislative disagreement, however, the position of Administrator was intentionally not funded at the time of enactment.⁶³

Additional changes included extension of coverage to nearly all employees by January 1, 1979, with the exception of domestic servants and casual household employees, persons covered under various federal workers' compensation acts, and specified agricultural or horticultural employees.⁶⁴ Prior law exempted an employer who had less than two employees, but the new act eliminated this numerical exception.⁶⁵

A statutory definition of disability was also part of the new act. Before this time, disability was undefined and it was left to the courts to determine a standard.⁶⁶ The Act adopted two definitions of disability, one for permanent total disability⁶⁷ and one for permanent partial disability.⁶⁸ Under its definition of permanent partial disability, the court defined "disability" to be equivalent to "impairment."⁶⁹

In the years following the 1977 reform, employers were dissatisfied

59. *Id.*

60. *Id.*

61. Sturm, *supra* note 31, at 4.

62. *Id.* at 5.

63. *Id.* at 4.

64. *Id.* at 10. Because the theory behind workers' compensation is to make the cost of injury a cost of production to be passed on to the consumer, domestic and household employees are not covered by the act because their employers are not in the business of producing any goods or services to which the costs can be added. The exemption for agricultural or horticultural employees working for an employer with a gross annual payroll of less than \$25,000 is probably to protect small farmers who do not produce enough to pass the costs on to consumers. *Id.* at 11.

65. *Id.* at 11.

66. *Id.* at 11-12.

67. Permanent total disability is "incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee is or becomes physically suited and reasonably fitted by education, training or experience." OKLA. STAT. tit. 85, § 3(12) (1981).

68. OKLA. STAT. tit. 85, § 3(13) (1981) states that permanent partial disability means "permanent disability which is less than total and shall be equal to or the same as permanent impairment."

69. *Id.* See also Sturm, *supra* note 31, at 13-16.

because they felt that the 1977 Act went too far in liberalizing recovery, thereby increasing costs to employers.

C. *Dissatisfaction and the 1986 Changes*

During the summer of 1985, the National Council on Compensation Insurance submitted a rate increase of 41.9 percent to the State Board for Property and Casualty Rates.⁷⁰ The rate increase was requested because the insurance companies had not received needed rate increases since 1979. Rates had not been adjusted to compensate for increased benefits, and medical costs and attorney fees had risen.⁷¹ Because the requested increase was so large, House Speaker Jim Barker asked Attorney General Mike Turpen to intervene before the Board on behalf of the state.⁷² Barker also appointed a subcommittee of the House Special Investigative Committee to study the entire compensation system, and Governor George Nigh appointed a "blue ribbon panel" of citizens to investigate the compensation system.⁷³

Recommendations considered by the subcommittee included:

- (1) adoption of a medical fee schedule;
- (2) extension of the waiting period before an injured employee could receive compensation from three days to seven days;
- (3) tightening of the statutory language "arising out of and in the course of employment"; and,
- (4) division of the system to allow the Administrator to deal with routine cases and the Workers' Compensation Court to deal with more complex cases.⁷⁴

The Governor's Workers' Compensation Review Committee's report contained similar recommendations.⁷⁵

Workers' compensation reform legislation was enacted on June 9, 1986, and took effect on November 1, 1986.⁷⁶ The legislation takes the form of amendments to Titles 40 and 85 of the Oklahoma Statutes, as well as the addition of sections to Title 85.

70. Hamilton, *supra* note 2, at 5.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 6-7.

75. 46 OKLA. LEGIS. REP., Jan. 16, 1986, at H-2 to H-3; Weekly Review Edition, OKLA. LEGIS. REP. Jan. 17, 1986, at 10-11.

76. Act of June 9, 1986, 1986 Okla. Sess. Laws 222 (codified at OKLA. STAT. tit. 40 and tit. 85 (1986)).

1. Changes Directly Affecting Employees

Employees will no longer be awarded compensation for injuries occurring in the course of employment but which do not arise out of employment because of a purely personal risk to the employee.⁷⁷ This section was added to avoid cases such as *Fox v. National Carrier*,⁷⁸ in which a traveling employee received compensation for choking on food during a business trip.

Under the new law, an employee is not compensated for the first seven days of his disability instead of three days, as under the previous law. However, if the disability continues for more than twenty-one days, the employee will receive compensation for the entire period of disability, including the seven-day waiting period.⁷⁹ The National Commission on Compensation Insurance testified that this change would mean an immediate rate decrease for compensation insurance.⁸⁰ The short waiting and retroactive periods under previous law were pinpointed as a problem area adding to the benefits paid under the system and thus to insurance rates.⁸¹

An employee may choose a treating physician and may change physicians with the approval of the Workers' Compensation Court or Administrator, or by agreement of the parties. However, if an employee changes physicians without approval or agreement, the employer's liability for physicians' fees of unapproved physicians is limited to five hundred dollars. This does not include referrals by the treating physician.⁸² By preventing "doctor shopping," where an injured employee goes to several physicians to obtain a high disability rating, the provision should decrease costs. It will also allow the court to scrutinize treatment more closely.⁸³

77. OKLA. STAT. tit. 85, § 3(7) (1986).

78. 709 P.2d 1050 (Okla. 1985). In awarding compensation to the employee, the Oklahoma Supreme Court specifically quoted from Larson's treatise that, as a general rule, any injury to a traveling employee is held to arise out of and in the course of employment if it occurred during the trip. *Id.* at 1053. This provision of the Workers' Compensation Act would not allow a court to reach that result in future cases.

79. OKLA. STAT. tit. 85, § 13 (1986).

80. COMPARISON OF SB 496 AND HB 2053 AND OTHER PROPOSED CHANGES IN WORKERS' COMPENSATION STATUTES at 3 (1986) [hereinafter COMPARISON].

81. SUBCOMMITTEE TO STUDY THE OPERATION OF THE STATE INSURANCE FUND, FINAL REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE, at 4 (Jan. 8, 1986) [hereinafter FINAL REPORT].

82. OKLA. STAT. tit. 85, § 14(G) (1986). The attending physician chosen by the employee must now notify the employer or insurance carrier within seven days after examination or treatment is first rendered. *Id.* § 14(C). Previous law called for notification "within a reasonable time." *Id.*

83. FINAL REPORT, *supra* note 81, at 4; COMPARISON, *supra* note 80, at 4.

In cases of both temporary total and temporary partial disability, an employee is now limited to receiving compensation for one hundred fifty weeks instead of the previous three hundred weeks. However, after one hundred forty weeks of compensation, an employee may request a review of his case. If the court determines that compensation should be continued, the employee will be eligible for one hundred fifty additional weeks of temporary compensation.⁸⁴ This provision was probably inserted to ensure that an employee receiving temporary disability compensation is actually disabled for the duration of his compensation payments.

An employee must either give notice, oral or written, to an employer within sixty days after the date of injury or receive medical care from a licensed physician during that time period.⁸⁵ If he neither gives notice nor receives treatment, his claim is barred unless he shows good cause explaining his failure to do so. The trial court has discretion to determine whether the employee has shown good cause.⁸⁶ The statutory limitation period for an occupational disease or repeated trauma is set out in another part of the act.⁸⁷

An employee of the state or other political subdivision injured while working for a private employer and off duty from his public employment can look only to the private employer for compensation for injuries arising out of and in the course of the private employment.⁸⁸ The rationale is to cut costs for municipalities while requiring private employers to assume the responsibility of insuring for work-related injuries.⁸⁹

The term "employee" will not cover an owner-operator of a truck if the owner-operator actually operates the truck and the truck is not leased by the person contracting with the owner-operator.⁹⁰ Additionally, a sole proprietor, partner, or owner of more than ten percent of the stock in a corporation who acts as a subcontractor must elect to be covered under the prime contractor's workers' compensation policy or he cannot collect

84. OKLA. STAT. tit. 85 § 22(2) (temporary total disability) and § 22(4) (temporary partial disability) (1986).

85. *Id.* § 24.2(A).

86. *Id.*

87. *Id.* § 43.

88. *Id.* § 2b(D).

89. COMPARISON, *supra* note 80, at 3. This provision was added after an Oklahoma City police officer who was shot and injured while working as a part-time security officer for a shopping mall was ordered to receive workers' compensation payments by the Workers' Compensation Court. The Tulsa Tribune, Jan. 30, 1986, at 1, col. 5. The court ordered Oklahoma City to make payments to the officer, reasoning that the officer was responding to a possible crime and was therefore acting for the city. *Id.*

90. OKLA. STAT. tit. 85, § 3(4) (1986).

benefits thereunder.⁹¹ This language apparently tightens up the definition of an employee to prevent independent contractors, who presumably can insure themselves, from recovering under a contractor's workers' compensation policy.

2. Changes Directly Affecting Employers

An employer who fails to secure workers' compensation insurance required under the act will be liable for a civil penalty up to a maximum of ten thousand dollars.⁹² The Commissioner of Labor has discretion to reduce the amount of the penalty based on the life of the business of the employer, the seriousness of the violation, and the employer's attempts to comply with the requirement.⁹³ An employer who willfully fails to secure insurance is guilty of a misdemeanor and is subject to both fine and imprisonment.⁹⁴ Any employer who knowingly gives false information to the Administrator in order to become self-insured, an "own-risk" carrier, or a group pool association will be subject to prosecution for perjury.⁹⁵ These penalties will arguably encourage the employer to secure compensation insurance.

An employer will be permitted to ask an employee about any workers' compensation benefits received while the employee was in a previous employment. If the employee gives an untruthful answer about any permanent partial disability awards already received, the employer will be permitted to discharge him.⁹⁶ With this information employers will be able to police fraudulent claims and avoid assigning employees to work which might aggravate prior injuries.

An employer or his insurance carrier will be permitted the right of subrogation to recover from a third person all expenses of the accident or the last illness of an employee. All common law rights are preserved in pursuing a claim against the third party.⁹⁷ An employer may recover amounts paid to an employee by a tortfeasor and possibly cut the cost of insurance premiums.⁹⁸

91. *Id.*

92. *Id.* § 63.1(A).

93. *Id.* § 63.1(B). A Workers' Compensation Enforcement Revolving Fund is established to consist of all monies collected by the Department of Labor from fines under § 63.1(A). *Id.* § 63.1(C).

94. *Id.* § 63.3(A).

95. *Id.* § 61(d)(2)(B).

96. *Id.* § 110.

97. *Id.* § 44(c).

98. FINAL REPORT, *supra* note 81, at 7; COMPARISON, *supra* note 80, at 6.

If, within the statutory time period, an insurer does not commence weekly temporary total disability payments for an undisputed injury of which the employer has received notice, the insurer will be required to pay the employee a penalty of fifteen percent of the weekly benefits due at the time of the hearing.⁹⁹ This is an incentive for prompt payments to the injured employee who often has no other source of income.

A safer workplace is one of the goals of a workers' compensation system. Under the new Act, the Commissioner of Labor will be required to provide occupational safety and health consultation upon the written request of a private employer. The Commissioner and his representatives will not be permitted to report any safety or health hazards discovered during such consultation unless a condition of imminent danger exists.¹⁰⁰ This provision should encourage the employer to seek a consultation.

An employer will still be liable for actual and punitive damages for retaliatory discharge of an employee for filing a workers' compensation claim, but punitive damages will be limited to one hundred thousand dollars.¹⁰¹ This provision is a compromise between the House and Senate bills introduced in the 1986 legislative session. While desiring to limit penalties on employers for unlawfully terminating less productive workers, the Act rejected a provision in the House bill eliminating punitive damages and repealing the requirement of reinstatement of a wrongfully terminated employee. The limitation on punitive damages represents a compromise position on this issue.¹⁰²

3. Changes in Workers' Compensation Procedure

Qualifications for the position of Administrator will be determined by the judges of the Workers' Compensation Court and submitted to the Chief Justice of the Supreme Court for his approval, modification, or disapproval.¹⁰³ Because of the perception that the workers' compensation system in Oklahoma has been inefficient, the Administrator is to be

99. OKLA. STAT. tit. 85, § 24.2(B) (1986).

100. *Id.* tit. 40, § 414(D), (E).

101. *Id.* tit. 85, § 6. Liability of the state or a political subdivision for wrongful discharge of an employee will be limited by the Governmental Tort Claims Act. *Id.* § 6.1.

102. COMPARISON, *supra* note 80, at 3.

103. OKLA. STAT. tit. 85, § 1.2(I) (1986). The judges no longer have the power to select the Administrator as under former law. The Administrator will be appointed by the presiding judge of the Workers' Compensation Court from a list of eligible persons chosen by the Special Workers' Compensation Administrator Selection Committee. *Id.* § 1.3(C). The Administrator's compensation will be ninety percent of the authorized salary of a judge of the Workers' Compensation Court, *id.* § 1.3(D), and he may only be removed for cause, *id.* § 1.3(E).

given expanded powers and duties to increase efficiency.¹⁰⁴

The main change to streamline the system is that the Administrator will deal with less technical cases and leave more complex cases to the Workers' Compensation Court.¹⁰⁵ The Administrator will organize, direct, and develop the administrative work of the court, hire staff, and promulgate all necessary rules and regulations.¹⁰⁶ The Administrator will also have the power to hear and approve settlements, hear and determine claims concerning disputed medical bills,¹⁰⁷ adopt a schedule of fees and treatment for all medical providers, and have the power to approve these charges and the duration of treatment.¹⁰⁸ He will review and approve applications for "own-risk" and group self-insurance associations and will monitor these programs.¹⁰⁹

The Administrator will provide printed notice forms for use by injured employees.¹¹⁰ He will establish a toll free telephone number to provide information and answer questions about the Workers' Compensation Court.¹¹¹ On July 1st of each year, the administrator will prepare and submit a report to the Governor, Chief Justice of the Oklahoma Supreme Court, President Pro Tempore of the Senate, Speaker of the House, and each member of the legislature. The report will detail the number of awards made, causes of accidents, work load of the court, and expenses of the Office of Administrator for the previous year. The report will also include recommendations by the Administrator.¹¹²

A judge of the Workers' Compensation Court will now be required to have at least two years trial experience before the Workers' Compensation Court prior to appointment to the court. Workers' compensation judges will no longer select the presiding judge; the judges will now be appointed by the Governor.¹¹³

104. The Subcommittee to Study the Operation of the State Insurance Fund found that the administrative structure of workers' compensation should be changed. Since "the system was intended to be administrative rather than adversarial, . . . the extent of litigation signals a problem." FINAL REPORT, *supra* note 81, at 5.

105. *Id.*

106. OKLA. STAT. tit. 85, §§ 1.3(G), (H).

107. *Id.* § 3.7(A)(1) and (5).

108. *Id.* § 14(E). The schedule is to be adopted after notice and public hearing and is to be based on the customary and reasonable charges of health care providers in the area. A party aggrieved by a decision of the Administrator can request a hearing by the full Workers' Compensation Court. *Id.*

109. *Id.* § 3.7(A)(2) and (3).

110. *Id.* § 26(A).

111. *Id.* § 3.7(A)(4).

112. *Id.* § 85.

113. *Id.* § 1.2(B) and (D).

A prehearing conference before a Workers' Compensation judge is to be held within forty-five days of a request for a conference by either party. The conference is specifically for the purpose of pursuing settlement of the claim or determining the issues in dispute.¹¹⁴ This will provide quicker disposition of cases and help clear a judge's docket. In addition, more objective medical evidence can be obtained to justify the judge's decision.¹¹⁵

If there is a difference in opinion of more than twenty-five percent between the employer's medical experts and the employee's medical experts regarding the extent of an employee's permanent impairment, a third physician will be selected by the parties or appointed by the Administrator. The opinion of a third physician is required if the physicians disagree as to the medical cause of the impairment or if the employee has lost no time from employment. Written notice challenging the medical testimony of the other party must be given before or during a prehearing conference.¹¹⁶

A worker is still able to recover for an accidental injury even if he has suffered a previous disability or impairment. Under prior law, the previous impairment had to have been adjudicated to be permanent in nature. The new law removes this requirement of adjudication of the first injury.¹¹⁷ This may allow for better employer defenses to claims of injuries which aggravate an employee's pre-existing condition.¹¹⁸

Payments on pre-existing permanent impairment orders must be completed before payments on subsequent permanent impairment orders can commence.¹¹⁹ This will stop claim stacking or filing multiple claims at the same time.¹²⁰

114. *Id.* § 3.4.

115. COMPARISON, *supra* note 80, at 2.

116. OKLA. STAT. tit. 85, § 17(A) (1986). Prior law required an opinion of a third physician only in cases in which the difference was greater than thirty percent. The reason for the change was to create more independent medical evaluations, especially in situations in which disability may be suspect. COMPARISON, *supra* note 80, at 4, 5. The court-appointed physician making the evaluation is no longer required to have had at least five years of practice in the specific area of his evaluation. OKLA. STAT. tit. 85, § 17(B) (1986). No particular reason is given for this change, but it would seem to increase the number of physicians available to make the reports.

Another change in the medical area is that the Workers' Compensation Court will be permitted to accept testimony from a psychologist, but only if it is made under the direction of a medical doctor. *Id.* § 14(D). This apparently broadens the medical testimony somewhat as it does not appear that psychologists were allowed to testify under prior law.

117. OKLA. STAT. tit. 85 § 22(7) (1986).

118. COMPARISON, *supra* note 80, at 5.

119. OKLA. STAT. tit. 85 § 22(12) (1986).

120. COMPARISON, *supra* note 80, at 6. The House Bill originally proposed that no subsequent awards could be paid until *all* pre-existing orders had been paid. The Legislature was concerned,

An "Individual Self-Insured Guaranty Fund Board" and a "Group Self-Insurance Association Guaranty Fund Board" will be established. The Act contains specific provisions as to how each fund is to be established and governed.¹²¹

IV. RECOMMENDATION

Oklahoma has made a start in real workers' compensation reform by streamlining the office of Administrator to increase efficiency. However, Oklahoma's complex schedule for permanent partial disability compensates for physical impairment without regard to wage loss or loss of earning capacity. Fifteen weeks of compensation for the loss of a little finger¹²² may not approach an appropriate level of compensation for lost wages or earning impairment of a concert violinist, but it may be a wind-fall recovery for a garbage collector. Likewise, 250 weeks of compensation for loss of a leg¹²³ may not adequately compensate the garbage collector, but the violinist would be paid for an injury which probably has little, if any, effect on his earning capacity.

Oklahoma should carefully examine the actual wage loss system that Florida has established to see if it would serve Oklahoma's needs in a less expensive manner. Oklahoma's Subcommittee to Study the Operation of the State Insurance Fund recommended that the legislature consider linking benefits to actual wage loss and loss of future earning capacity.¹²⁴ The Oklahoma Legislature apparently chose not to consider such a system in its 1986 Act.

When Florida reformed its workers' compensation system in 1979, the revisions were "necessitated by the high dollar cost of the current system, its well-intended but inequitable awards, and the delay of claims resolution as reflected by the high level of litigation."¹²⁵ This description applies equally well to Oklahoma's workers' compensation system today. Even if Oklahoma does not wish to adopt Florida's statute verbatim, it should examine the cost benefits which Florida has realized over the last several years since enactment of the act before it decides to continue with

however, about a situation in which an employee with a permanent award was reinjured and could not receive his temporary award until the permanent one was paid. *Id.* This provision of the Act addresses that concern by only delaying awards for permanent impairment.

121. OKLA. STAT. tit. 85 §§ 66.1 and 66.2 (1986).

122. OKLA. STAT. tit. 85, § 22(3) (1981).

123. *Id.*

124. FINAL REPORT, *supra* note 81, at 5.

125. Sadowski, *supra* note 39, at 649-50.

its present physical impairment statute.¹²⁶

V. CONCLUSION

Workers' compensation began as remedial legislation to provide an injured worker needed medical attention and compensation for loss of wages and earning capacity. Over the years, it has strayed from its original objective in many states. Oklahoma is now faced with higher insurance premiums to cover the cost of a system which does not serve its intended purpose.

It is time for the state legislature to reconsider the theory underlying the workers' compensation system. Some type of wage loss or earning impairment standard needs to be enacted because a wage loss or earning impairment standard would be more fair and less expensive for all concerned.

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126. Although Florida reformed its workers' compensation system in 1979, no studies have been undertaken by the State to determine the success of the program.

